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No. 93-1265

In the Supreme Court of the United States

OCTOBER TERM, 1993

GARY L. DOUGHARTY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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12 pp

QUESTION PRESENTED

Whether the United States Army acted arbitrarily, capriciously, or contrary to law in discharging petitioner from service on the ground that he engaged in a pattern of misconduct.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Bowman Transp., Inc. v. *Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281 (1974)	6, 8
Goldberg v. *Kelly*, 397 U.S. 254 (1970)	6
Matlovich v. *Secretary of the Air Force*, 591 F.2d 852 (D.C. Cir. 1978)	7, 8

Regulations:

Army Reg. 635-200, *Enlisted Ranks Personnel* (Oct. 17 1990)	9
para. 1-17	9
para. 2-12b(6)	8

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. A1) is unpublished, but the judgment is noted at 11 F.3d 1073 (Table). The opinion of the Court of Federal Claims (Pet. App. A2-A35) is reported at 27 Fed. Cl. 436 (1993).

JURISDICTION

The judgment of the court of appeals was entered on November 9, 1993. The petition for a writ of certiorari was filed on February 4, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner joined the United States Army in 1975 and re-enlisted in 1987, serving continuously on active duty. Pet. App. A2-A3. In 1988, civilian police officers arrested petitioner for criminal trespass following a verbal altercation in a convenience store. *Id.* at A3. Shortly thereafter, petitioner's platoon sergeant noted in a memorandum that petitioner did not follow instructions and exhibited a "total lack of motivation or dependability." *Ibid.*

In 1989, civilian police officers arrested petitioner for assault on his then wife and for resisting arrest. Pet. App. A3-A4. Those charges were dropped at trial when petitioner's wife recanted her charges. *Id.* at A4. In January, 1990, petitioner held a gun to his wife's head and threatened to kill her. *Ibid.* Petitioner subsequently pleaded guilty in civilian court to felony assault and served 15 days in jail. *Ibid.* Several months later, Captain Rodney F. McBride notified petitioner of his intent to initiate administrative proceedings to discharge him from the Army. *Ibid.* Captain McBride subsequently halted the processing of the separation proceedings, however, and instead placed petitioner on rehabilitative reassignment to another platoon. *Id.* at A4-A5.

Shortly after arriving at his new platoon, petitioner was relieved of duty as platoon sergeant and counseled for poor uniform appearance, failure to inform commanders about changes in platoon schedules, and absence from an organized function. Pet. App. A5. The platoon's First Sergeant gave petitioner a rehabilitative assignment with yet another platoon. *Ibid.* Army officials recommended another rehabil-

itative transfer in September, 1990, as a result of further unsatisfactory behavior. *Id.* at A5-A6. Before that rehabilitative transfer occurred, however, petitioner requested and received a non-rehabilitative, lateral transfer. *Id.* at A6.

Two months after petitioner's lateral transfer, his staff sergeant reported that petitioner was ineffective as a noncommissioned officer and insubordinate to fellow noncommissioned officers. Pet. App. A6. Petitioner's supervisor counseled him numerous times concerning petitioner's poor performance, noting that petitioner lacked training, self-motivation, and leadership skills. *Id.* at A6-A7. The supervisor warned petitioner on two occasions that he would be discharged if his conduct did not improve. *Id.* at A7.

In January, 1991, Captain J. Sladen Bradley (petitioner's company commander) notified petitioner of his intention to initiate administrative separation proceedings to discharge petitioner, because petitioner's records indicated no improvement in his performance or behavior. Pet. App. A8-A9. Captain Bradley initiated the process in April, 1991. *Id.* at A9-A10. Captain Bradley also recommended to the official charged with decision-making authority that an Army regulation requiring a rehabilitative transfer be waived on the ground that "further attempts at rehabilitation would not be in the best interests of the Army." *Id.* at A10.

2. Petitioner appeared before an administrative separation board in May, 1991. Pet. App. A10. Letters and written counseling statements documenting petitioner's poor performance and misconduct, as well as civil and military police records, were admitted

into the hearing record without objection by petitioner. *Ibid.* Two witnesses testified about petitioner's poor leadership and supervisory skills, and about his failure to follow orders. *Ibid.* Petitioner presented four witnesses who praised his technical skills and recommended his retention in the Army. *Id.* at A11.

The board found that petitioner had engaged in misconduct by his involvement in at least two incidents with civil authorities, his poor duty performance in two different units over a period of less than three years, and his apparent lack of subordination to authority. Pet. App. A11. The board recommended that petitioner be separated from the Army, but also that the separation be suspended for six months and that petitioner receive a rehabilitative transfer to a new unit. *Ibid.* Colonel Joseph C. Windle, the separation authority, approved the board's findings. He rejected, however, the recommendations for suspension of the discharge and for a rehabilitative transfer. *Id.* at A11-A12. Colonel Windle accordingly waived the rehabilitative transfer requirement in writing and directed that petitioner be discharged immediately. *Id.* at A12.

3. Petitioner thereafter brought this action in the Court of Federal Claims, alleging that his discharge was unlawful and seeking reinstatement and back pay. Pet. App. A2. The court granted summary judgment for the Army. *Id.* at A33. It first held that the Army acted properly in considering petitioner's felony conviction in the discharge proceedings, and also that it was not improper for the Army to consider incidents of misconduct that did not result in criminal convictions. *Id.* at A17-A22. The court next rejected

petitioner's argument that he was not given a sufficient opportunity to benefit from counseling and to cure his deficiencies, noting that petitioner received counseling and rehabilitative opportunities for more than a year. *Id.* at A22-A24.

The court also rejected petitioner's argument that the Army violated the rehabilitative transfer requirement. The court found that the written waiver of a rehabilitative transfer fully complied with the regulation, and that, even if the waiver were not valid, the lateral transfer that petitioner received in October, 1990, met the rehabilitative transfer requirement. Pet. App. A27-A28. Finally, the court rejected petitioner's argument that his counseling records should not have been considered in the discharge proceedings, noting that Army regulations expressly provide for consideration of these records. *Id.* at A31-A32.

4. The court of appeals affirmed without opinion. Pet. App. A1.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. a. Petitioner first argues (Pet. 11-21) that the Army's decision is arbitrary and capricious because military officials did not provide a sufficient statement of reasons for the decision. Petitioner, however, was fully aware of the reasons for the action against him. Army officials notified petitioner of his unacceptable conduct, repeatedly warned petitioner that he would be discharged if his conduct did not improve,

and further notified him that the separation proceedings were based upon a "pattern of misconduct." See Pet. App. A4-A10. Moreover, the administrative board's findings explicitly set out the nature of petitioner's pattern of misconduct: his discreditable involvement in at least two incidents with civil authorities, his poor duty performance in two different units over a period of less than three years, and his apparent lack of subordination to authority. *Id.* at A11.

b. Petitioner's contention (Pet. 19-20) that the separation authority did not provide sufficient reasons for waiving the rehabilitation requirement likewise is without merit. While an agency must articulate a rational connection between the facts and the decision it makes, see *Bowman Transp., Inc.* v. *Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974), the agency decision "need not amount to a full opinion or even formal findings of fact and conclusions of law." *Goldberg* v. *Kelly*, 397 U.S. 254, 271 (1970). Courts must uphold even "a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp.*, 419 U.S. at 286.

The Army's basis for waiving the option of a rehabilitative transfer is readily discernable from the record. Petitioner's pattern of misconduct was well documented, and he had previously been given a lateral transfer in 1990 to a new company, with new supervisors, in order to obtain a fresh start. Before that transfer, petitioner had twice been transferred between platoons within the same company. In light of petitioner's extensive record of improper activities and poor performance, as well as previous unsuccessful attempts to rehabilitate him, Captain Bradley

recommended waiver of the rehabilitative transfer requirement because he felt that "*further* attempts at rehabilitation would not be in the best interests of the Army," as they would not produce a quality soldier. Pet. App. A10 (emphasis added).

Colonel Windle, the separation authority, had before him petitioner's extensive record of misconduct and of prior rehabilitative attempts. He also had before him two competing recommendations: Captain Bradley's recommendation against rehabilitation on the ground that further rehabilitative efforts would be fruitless, and the administrative board's recommendation that petitioner receive a rehabilitative transfer. Colonel Windle's decision to choose Captain Bradley's recommendation, when considered in light of the evidence in the record, provides a readily discernable path to the decision to discharge petitioner without providing him with yet another opportunity for rehabilitation.

c. There is no merit to petitioner's contention (Pet. 14-17) that the decision in this case conflicts with *Matlovich* v. *Secretary of the Air Force*, 591 F.2d 852 (D.C. Cir. 1978). *Matlovich* involved a constitutional challenge to Army regulations mandating the discharge of homosexuals from military service in the absence of "unusual circumstances." *Id.* at 855. The court declined to address the constitutional issue, however, and held instead that the Air Force had not provided a sufficient explanation as to whether there existed "unusual circumstances" sufficient to warrant retention of the plaintiff notwithstanding his admitted homosexuality. *Id.* at 855-857.

Matlovich did not establish a general rule that the military must supply formal findings and a written statement of reasons for every discharge. The court remanded because the regulation at issue did not specify any standards for deciding when unusual circumstances existed, *and* because there was no discernable explanation in the record explaining the agency's decision. As the court put it, "[t]he absence of articulated standards, policies, or considerations—*plus* the absence of any reasoned explanation in this particular case—makes it impossible to decide whether or not there has been an abuse of discretion in this instance or whether improper factors have played a material role." 591 F.2d at 856 (emphasis added). *Matlovich* is therefore consistent with the general rule that an agency's decision will be upheld when its "path may reasonably be discerned." *Bowman Transp.*, 419 U.S. at 286.

d. Petitioner also claims (Pet. 13-14, 20) that an abuse of discretion must be found because Colonel Windle declined to accept the recommendation of the administrative board. However, Army regulations expressly state that a board recommendation that discharge be "suspended" is not binding upon the separation authority. Army Reg. (AR) 635-200, *Enlisted Ranks Personnel*, para. 2-12b(6) (Oct. 17, 1990). Given the competing recommendation of petitioner's own company commander that the rehabilitation requirement be waived, it was not an abuse of discretion for Colonel Windle to reject the recommendation of the administrative board.

2. Petitioner also contends (Pet. 22-25) that counseling forms from a prior command should have been destroyed upon his transfer to a new unit and,

therefore, not used as support for his discharge. That contention does not warrant review.

Petitioner relies upon a statement printed at the bottom of the standardized counseling forms that the form "will be destroyed upon * * * reassignment (other than rehabilitative transfers), separation at ETS, or upon retirement." Pet. App. D. The form also contains a legend, however, reciting that use of the form is governed by AR 635-200. See *ibid.* That regulation specifically provides that the soldier's entire military record from his current enlistment—including counseling records—should be considered in separation proceedings. AR 635-200, para. 1-17 (Oct. 17, 1990). Based upon the clear language of the regulation, the Court of Federal Claims correctly held that consideration of the forms at the administrative hearing was proper.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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